

[Case Title] In re:Dennis L. & Kathy L. Alden, Debtor's
[Case Number] 90-11044
[Bankruptcy Judge] Arthur J. Spector
[Adversary Number]XXXXXXXXXX
[Date Published] December 4, 1990

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

In re: DENNIS L. ALDEN and
KATHY L. ALDEN,

Case No. 90-11044
Chapter 13

Debtor.

APPEARANCES:

KEITH M. KERWIN
Attorney for Debtors

JAMES W. BATCHELOR
Attorney for Union Federal Savings Bank

**MEMORANDUM OPINION ON DEBTORS' OBJECTION
TO CLAIM OF UNION FEDERAL SAVINGS BANK**

The question is whether the claim of this real property mortgagee insured under the National Housing Act, includes attorney fees incurred when it commenced but did not complete a foreclosure sale of the Michigan premises.

The issue arises in the following context. On January 18, 1990, Dennis L. and Kathy L. Alden ("Debtors") filed their joint voluntary petition for relief under Chapter 13 of the Bankruptcy Code. Their home was purchased with the proceeds of a loan from Waterfield Financial Corporation. They executed a note and mortgage on the standard Housing and Urban Development ("HUD") forms for use in the State of Michigan. By assignment,

Union Federal Savings Bank ("Bank") now stands in Waterfield's shoes with respect to that transaction. The Debtors filed a Chapter 13 plan which was amended two times, most recently on May 3, 1990. This latest version provides that the Bank will retain its lien on the Debtors' home and be paid \$567.00 per month, which amount includes the tax and insurance escrow. The \$4,087.76 which was in default when the case was filed would be paid in full without interest¹ during the course of the plan. The Bank filed a proof of claim which, among other things, claimed that \$735.60 additional was in default due to foreclosure costs of \$235.60; foreclosure attorney fees of \$400.00 and Chapter 13 attorney fees of \$100.00. The Debtors filed an objection to this claim on the ground that the Bank is not entitled to any attorney fees because the agreement of the parties did not provide for attorney fees. The Bank asserts that the small print at the bottom of the first page of the mortgage form incorporates all National Housing Act regulations, one of which, 24 C.F.R. Chap. II (4-1-89 Ed.) §203.552, it submits, obligates the Debtors to pay its attorney fees.

This dispute arises under and is defined by 11 U.S.C. §506(b) which states:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than

¹As this term of the plan, depriving the mortgagee of interest on the arrearages violates the rule in In re Colegrove, 771 F.2d 119 (6th Cir. 1985), the plan obviously cannot be confirmed. For this reason, the Bank's objection to confirmation will be sustained. This, however, does not resolve the claim objection at issue here.

the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

It is undisputed that a creditor is entitled to its attorney fees under this section only when the creditor satisfies these four conditions: "the claim must be an allowed secured claim; the creditor must be oversecured; the fees must be reasonable; and the fees must be provided for in the agreement." In re Kudlacek, 109 B.R. 424, 426 (Bankr. D. Nev. 1989), paraphrasing In re Salazar, 82 B.R. 538, 540 (9th Cir. B.A.P. 1987). The parties agree that the Bank's claim is an allowed secured claim and that the Bank is oversecured. The Debtors dispute the reasonableness of the fees, but that issue, as we see it, should logically follow the determination of the remaining element--whether the fees are provided for in the agreement. This latter issue is the dispute at hand.

We have carefully examined the note and the mortgage. The document entitled "Mortgage Note" is on HUD Form 99131 (9-79) and memorializes the Debtors' obligation to pay to the order of the lender \$52,834.00 "with interest from date at the rate of 10% per annum on the unpaid balance until paid." Nowhere in the document do the borrowers promise to pay anything other than principal and interest. Even on default, no penalties or other charges are mentioned.

The four-page document entitled "Mortgage" is on HUD Form 92131M-1 (2-85 Ed.). The possibly relevant provisions are identified here. The

opening paragraph states that in consideration of the \$52,834.00 "and for the purpose of securing the repayment of said sum, with interest as hereinafter provided, and the performance of the covenants hereinafter contained" the Debtors mortgage their home to the lender. The second page expounds on the obligation as follows: "if the Mortgagor shall pay the principal and all interest as provided in a certain promissory note executed by said Mortgagor to said Mortgagee of even date herewith and shall pay all other sums hereinafter provided for, and shall well and truly keep and perform all of the covenants herein contained, then this mortgage and the aforesaid note shall be null and void"

The first listed covenant was to repay the "\$52,834.00 with interest from date at the rate of 10% per annum on the unpaid balance until paid." The third covenant obligated the Debtors to pay escrow payments for taxes and insurance. It specifically allocated the aggregate monthly payment first, to property taxes and insurance; second, to pay interest accrued on the principal balance; third, to amortize principal; and fourth, "late charges" which are limited to "4¢ for each dollar of each payment more than 15 days in arrears." In the event of a default, the eighth covenant requires the Debtors to pay for the cost to the Mortgagee of obtaining "abstracts of title and the tax histories of said property" and permits the lender to "pay therefor such sums as it may deem to be necessary." The lenders "shall be the sole judge of the amount necessary to be paid therefore." The ninth covenant says that the Debtors "will pay to the

Mortgagee forthwith the amounts of all sums of money which the Mortgagee shall pay or expend pursuant to the provisions, or any of them, hereinbefore contained, together with interest, upon each of said amounts until paid from the time of the payment thereof at the rate set forth in the note secured hereby and such payments shall be a further lien on the property under this mortgage." In the event of the Debtors' default, the 13th covenant gives the mortgagee the power to sell the property "pursuant to the statute in such case made and provided, and out of the proceeds of such sale to retain the monies due under the terms of this mortgage, the costs and charges of such sale and also the attorneys' fee provided by statute" (Emphasis added). Finally, at the bottom of the first page of the document, below the solid black line separating the substantive terms from in-house official notations such as the government form numbers, appears the following legend: "This form is used in connection with mortgages insured under the one-to-four-family programs of the National Housing Act which require a One-Time Mortgage Insurance Premium payment (including sections 203(b) and (i)) in accordance with the regulations for those programs.

The only reference to attorney fees is in the 13th covenant, and that expressly limits the Debtors' obligation to pay fees in two respects. First, it refers to an unidentified statute which provides for sales by mortgagees of mortgaged premises. The Bank identified no applicable federal statute and it is fairly certain that the only statute available for such a remedy is a creature of state law; it is codified as Chapter 31 of the

Revised Judicature Act of 1961 (RJA). Mich. Comp. Laws §600.3201, et. seq.²

In fact, the Bank admitted that it commenced foreclosure proceedings against the Debtors' home pursuant to this statute on December 28, 1989 and discontinued them when it received notice of the Debtors' Chapter 13 petition. Chapter 24 of the RJA, entitled "Costs," includes a section which states, in pertinent part, as follows:

(2) where an attorney is employed to foreclose a mortgage by advertisement, an attorney's fee, not to exceed any amount which may be provided for in the mortgage, may be included as a part of the expenses in the amount bid upon such sale for principal and interest due thereon in the following amounts:

(a) for all sums of \$1,000 or less, \$25.00.

(b) for all sums over \$1,000, but less than \$5,000, \$50.00.

(c) for all sums of \$5,000 or more, \$75.00.

But if payment is made after foreclosure proceedings are commenced and before sale is made, only one-half of such attorney's fees shall be allowed. Both the principal and the interest due thereon shall be included in the sum on which the attorney's fee is computed.

Mich. Comp. Laws §600.2431. Therefore, even assuming the foreclosure had been completed before the Debtors filed their petition for relief, the maximum attorney fee the Bank would be allowed to retain from the proceeds of sale under state law is \$75.00.

²The Act is entitled "Foreclosure of Mortgages by Advertisement," which is a remedy separate from judicial foreclosures, which is codified in a different chapter of the RJA.

Second, the covenant itself does not obligate the Debtors to pay attorney's fees to the Bank; it merely says that from the proceeds of a foreclosure sale, the Bank may retain an amount (limited by state law to \$75.00) toward its attorney fees. Since the foreclosure sale never occurred, there are no proceeds from which the Bank may retain such fees.

The Bank argues that the eighth and ninth covenants establish a contractual right to attorney's fees. This is clearly incorrect. The eighth covenant gives the Bank the right to charge the Debtors for the cost of obtaining abstracts of title and tax histories. Although the covenant provides that the Bank "may pay therefor such sums as it may deem to be necessary, and . . . shall be the sole judge of the amount necessary to be paid therefor," the mere obtaining of such records requires no legal expertise. If the Bank had wanted to charge for an attorney's time in interpreting such records and rendering an opinion therefrom, it could easily have provided such. This it clearly did not do.³

The ninth covenant obligates the Debtors to pay the Bank "all sums of money which the Mortgagee shall pay or expend pursuant to the provisions, or any of them, hereinbefore contained, together with interest" (Emphasis added). As has been seen, nothing contained in the

³Although we find nothing ambiguous about this paragraph, "[a]mbiguities must be resolved against the party drawing the contract," in this case, the Bank. Ben T. Young Co. v. Lafayette East Co., 56 Mich. App. 54, 57 (1974), citing Michigan Chandelier Co. v. Morse, 297 Mich. 41, 46 (1941).

mortgage prior to the ninth covenant, (or for that matter subsequent thereto either) obligated the Debtors to pay the Bank's attorney fees. We conclude therefore that the agreement does not expressly provide for the Bank's attorney fees.

Finally, the Bank argues that the Mortgage Note and Mortgage impliedly incorporate all of the regulations under the National Housing Act, 12 U.S.C. §1701 et. seq., and that those regulations apply "notwithstanding state law to the contrary." Page 7 of Bank's brief. The Bank baldly states, without authority to support it: "The 'agreement' in an FHA mortgage is broader than the wording of any single document." Page 3 of Bank's brief. We do not think so.

It is a commonplace that when construing a contract "[i]f the language used by the parties is plain, complete and unambiguous, the intention of the parties must be gathered from that language, and from that language alone" 17 AmJur2d Contracts §245, page 634; Michigan Chandelier Co. v. Morse, 297 Mich. 41, 49 (1941); Taggart v. United States, 880 F.2d 867 (6th Cir. 1989). Here, nothing in the contract even hints that federal regulations are "incorporated" into the contract. Since the language used by the parties is plain, complete and unambiguous, we are precluded from reading into it such incorporation notions. Therefore, we conclude that federal regulations are not incorporated into the Mortgage Note or the Mortgage in question.

Moreover, even were we to find that the regulations were somehow

relevant, they do not compel the result the Bank espouses. The Bank's reliance on §203.552 is misplaced. That regulation reads in pertinent part, as follows:

(a) The mortgagee may collect reasonable and customary fees and charges from the mortgagor after insurance endorsement only as follows:

. . .

(9) Attorney's and trustee's fees and expenses actually incurred (including the cost of appraisals pursuant to §203.368(e) and cost of advertising pursuant to §203.368(h) when a case has been referred for foreclosure in accordance with the provisions of this part after a firm decision to foreclose if foreclosure is not completed because of a reinstatement of the account. (No attorney's fee may be charged for the services of the mortgagee's or servicer's staff attorney or for the services of a collection attorney other than the attorney handling the foreclosure.)

. . .

(12) Such other reasonable and customary charges as may be authorized by the Secretary. (This shall not include: (i) Charges for servicing activities of the mortgagee or servicer; (ii) fees charged by independent tax servicer organizations which contract to furnish data and information necessary for the payment of property taxes; (iii) "satisfaction", "termination", or "reconveyance" fees when a mortgage is paid in full (other than as provided in paragraph (a)(11) of this section), or (iv) the fee for recordation of a satisfaction of the mortgage in states where recordation is the responsibility of the mortgagee.)

(13) Where permitted by the security instrument, attorney's fees and expenses actually incurred in the defense of any suit or legal proceeding wherein the mortgagee shall be made a party thereto by reason of

the mortgage; (No attorney's fee may be charged for the services of the mortgagee's or servicer's staff attorney.)

. . .

(b) "Reasonable and customary" fees must be predicated upon the actual cost of the work performed including out-of-pocket expenses. Directors of HUD Area and Insuring Offices are authorized to establish maximum fees and charges which are reasonable and customary in their areas. Except as provided in this party, no fee or charge shall be based on a percentage of either the fact amount of the mortgage or the unpaid principal balance due on the mortgage.

It is quite apparent that this regulation gives the mortgagee the right to collect such fees that are "customary" in the relevant geographic area. In Michigan, the legislature has fixed the "custom" at \$75.00 after a completed foreclosure and half that amount when the foreclosure is aborted by payment. The Debtors here have the benefit of the automatic stay which prevents the foreclosure sale from occurring, and allows them to cure the default, to deaccelerate the indebtedness, and to reinstate the mortgage to a non-default status. In re Glenn, 760 F.2d 1428 (6th Cir. 1985). Their plan proposes to do this.

The American Rule of attorney fees provides that each party bears its own attorney fees unless an agreement or a statute provides otherwise. See generally Alyesca Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Mich. Comp. Laws §600.2431 is a statute which provides otherwise. But for that statute, if the parties' agreement did not provide that the mortgagor pay the mortgagee's attorney's fees, there would be no

legal basis for a mortgagee to charge attorney's fees. Thus, if the statute does not cover the circumstances here--foreclosure commenced, but aborted due to reinstatement short of full payment--then there is no statutory right by the mortgagee to attorney's fees. Therefore, although the Debtors' payment of the amount in arrears and reinstatement of the mortgage to current status may not be the functional equivalent of "payment" for purposes of §2431 of the RJA, the Bank can claim either the \$75.00 fee allowed for a completed foreclosure, or nothing at all.

The Bank seems to argue that this regulation allows the mortgagee to collect such attorney fees even though the actual agreement of the parties is silent as to such fees and is silent as to incorporation of the regulations. In essence, the Bank argues preemption. However, when Congress intended the National Housing Act to preempt state law, it knew how to say so. In 12 U.S.C. §1715(u)(5), Congress provided that the interest rate to be charged upon temporary mortgage assistance payments would be a rate established in a separate federal statute. With respect to this rate, Congress stated: "the interest rate to be charged shall be determined when the Secretary approves assistance under this subsection. Such charges shall be payable notwithstanding any provision of any state constitution or law or local law which limits the rate of interest on loans or advances of credit." Congress or the FHA could have easily specified such preemption with regard to attorney fees. Instead, the regulation specifically refers to customary rates of attorney fees. As we have seen, in Michigan, the

customary limit on such fees is \$75.00.

The regulation also specifies that the "Directors of HUD Area and Insuring Offices are authorized to establish maximum fees and charges which are reasonable and customary in their areas." 24 C.F.R. 203.552(b). (Emphasis added). The regulation does not authorize these officials to fix minimum attorney fees nor to fix them above state law. It authorizes them to fix the maximum, which term is modified by the phrase "which are reasonable and customary in their areas." (Emphasis added). Thus, the officials are not authorized to fix attorney fees higher than state laws permit. In our view, the regulation merely authorizes the lender to negotiate the inclusion of a provision for attorney's fees into their agreement with the borrower, and not to mandate it.

Finally, the argument that the regulation preempts and indeed supersedes the express contract of the parties is neither reasonable nor fair. If the Bank's theory were correct, then, a written contract between a borrower and an FHA insured lender which limited attorney fees to \$1.00, let's say, could be superseded by the regulation upon a showing by the lender that \$1.00 is below the "reasonable and customary fees." It is our opinion that the contract the parties made controls in such circumstances. We therefore think it controls here as well and conclude that the agreement of the parties does not impliedly incorporate the federal regulation in question. Accordingly, we conclude that the agreement of the parties does not permit the imposition of attorney's fees except in the case of a

foreclosure. In this case, the foreclosure was commenced but was interrupted by "payment" and therefore, the Bank is limited to \$37.50 for attorney fees.

For all of the reasons stated, the Debtors' objection to the claim of Union Federal Savings Bank is sustained except that \$37.50 will be allowed toward the Bank's attorney fees. A separate order will be entered forthwith.

Dated: November ____, 1990.

ARTHUR J. SPECTOR
U.S. Bankruptcy Judge